CENTER FOR REGULATORY REASONABLENESS

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October 17, 2016

VIA EMAIL

National FOIA Officer
United States Environmental Protection Agency
FOIA and Privacy Branch
1200 Pennsylvania Ave., NW (2822T)
Washington, D.C., 20460
Fax: (202) 566-2147
Email: FOIA-HQ@epa.gov

RE: Freedom of Information Act Request
Records Discussing Regulation of Flow as a Pollutant in NPDES Permits

Dear National FOIA Officer:

The undersigned, Center for Regulatory Reasonableness ("Center" or "CRR"), herewith files a request for Environmental Protection Agency ("EPA" or "Agency") records, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq*. Please note that the U.S. Department of Justice instructs, and such instruction is used here, that: "Since 1996 the FOIA has defined the term "record" as including "any information that would be an agency record subject to the requirements of [the FOIA] when maintained by an agency in any format, including an electronic format." *Department of Justice, Office of Information Policy (OIP) Guidance,* at 1.2

Focus of Present CRR FOIA Request

The Center seeks within this request EPA record(s) which authorize, or discuss that it is within EPA's authority to impose limitations on effluent flow in an a National Pollutant Discharge Elimination System ("NPDES") permits. The most recent example where EPA has sought to regulate flow as an effluent limitation is the proposed NPDES permit for the Town of Sunapee (NH), designated as NPDES Permit No. NH01005544. EPA included a detailed

description of its claimed authority for the imposition of "effluent flow" limitations in the Sunapee draft NPDES permit's Fact Sheet, at Sec. VII, Para. A, at 9 – 11. *See* Att. 1.

This records request is for any records constituting "guidance" on this topic by and between EPA HQ (any office thereof), or between EPA HQ and EPA Regional Offices or delegated states.[1] This is a straightforward and easy to understand request, directing the Agency's attention to its own stated conclusions in the Sunapee NPDES permit and Fact Sheet. Given the definition of the records sought, there cannot be valid claims of privilege or any withholding of a responsive document to this request. Finally, please note that CRR requests a fee waiver for this request. The justification for this Fee Waiver Request is included immediately below. The Agency must respond to this request without use of "boilerplate" responses, which often typify its answers. The Center is fully within its statutory rights to obtain the requested documents, to have them fully provided in a timely manner, and to have a fee waiver granted (copying charges are expected, however). To the extent that EPA seeks to withhold, in whole or in part, any record, it must be identified to CRR, including the address and subject lines and dates.

CRR's Fee Waiver Request Meets Applicable Requirements

The nature of this request fully meets the applicable basis for fee waiver, under applicable EPA regulations, at 40 C.F.R. §§ 2.107(l) (1) – (3) (hereinafter, "Sec.2.107" with appropriate sub-sections). EPA must find, based on extant facts, "that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." The CRR request here is also entirely supported by the analysis of the fee waiver provisions of the FOIA in *Cause of Action v. Federal Trade Commission*, 799 F.3d 1108 (D.C. Cir. 2015) ("*Cause of Action*"), and other FOIA case law. In addition to the discussion above, the following reviews the CRR request against the EPA regulatory standards (consideration of which is mandatory to EPA):

A. *First Fee Waiver Requirement*: "[D]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government[.]":

- *Subject of the FOIA Request* (Sec. 2.107(l)(2)(i)): The CRR request deals solely and entirely with "the operations or activities of the government." The Center seeks only to learn the basis of authority, and implementation, of specific flow control permit limitations for

[1] Per FOIA, 5 U.S.C. § 552(A)(2), we define Agency "guidance" as "(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public."

the Sunapee NPDES draft permit. As such, the subject areas for which records are sought could involve EPA regulations (*e.g*., 40 C.F.R. §122.44(d)), the Clean Water Act, including Section 303(d), Agency policies, and other Agency NPDES permit requirements (*e.g*., local growth impact issues). EPA, by law, drafts and ultimately approves the Sunapee NPDES permit and its flow-related conditions, and the public has a right to know what the Agency is doing, and by what authority. Such a public right is particularly obvious when EPA is the permitting entity in Region 1, and may seek to impose flow-related conditions in other NPDES permits within that region, or to States, which have been delegated NPDES authority.

- *Informative Value of the Information to be Disclosed* (Sec. 2.107(l)(2)(ii)): The information sought in this request is certainly "'likely to contribute' to an understanding of government operations or activities." *Id.* Permittees, including CRR's members, are entitled to understand on what basis the federal government is placing restrictions on the flows from the Sunapee treatment facility, and other conditions and requirements on controlling flows into the plant and related to the receiving waters of the discharge. The EPA Response will be instructive to the public, and to all permittees, in explaining by what authority it can limit flow from the Sunapee wastewater treatment facility ("WWTF"). Without a full understanding of such information, and the manner by which EPA is planning to enforce these new requirements, permittees will be far less able to recognize, and to comment on, or challenge, similar flow-related requirements that will likely be placed in their respective NPDES permits. Control over flow, directly or indirectly, impinges on areas of local decision-making. Local governments, and businesses located there, are financially impacted by, among other things, infrastructure demands that might be made on them by EPA to avoid enforcement sanctions. In this way, local communities, and businesses, must make important economic decisions on infrastructure development, and future compliance monitoring and costs, among other things, including their rights to seek redress for the imposition of unlawful requirements.

- *Disclosure Contributes to Public Understanding of the Subject* (Sec. 2.107(l)(2)(iii)): The Center is more than capable of quickly and efficiently disseminating this information to the interested public, CRR's members, and the broader municipal wastewater industry. CRR's Executive Director and General Counsel have decades of environmental law experience, both in private and governmental capacities allowing the expeditious and effective dissemination of the information obtained from EPA to the Center's client base and others that read the Center's Newsletter.[2] Looked at a different way, without EPA's full disclosure, the public will be entirely in the dark regarding what empowers EPA to add flow-based permit conditions that directly impact areas of traditionally local concern, such as infrastructure development, growth decisions, and the like. CRR specifically intends to take the documents

[2] *See, e.g.*, Newsletter, of February 2015, found here: http://static1.squarespace.com/static/52eb2b55e4b00030838c3c03/t/55afed05e4b082155fd35993/1437592837628/CRR_Newsletter_02_2015.pdf.

received from EPA's Response to this request and integrate their contents into a regulatory alert or broader newsletter to be disseminated to the interested public and constituent members, consisting of numerous municipal entities devoted to management and construction of wastewater treatment facilities within New England, and made available online for the broader public.

- *Significance of Contribution to Public Understanding* (Sec. 2.107 (l)(2)(iv)): This query has largely been asked and answered above. Upon information and belief, no one in the public knows the basis by which important EPA flow permitting limits are being imposed for the Sunapee permit. If disclosure of this information is refused by EPA, the affected public will continue not to know the "how and why" of what will likely be similarly imposed in their own permits. As to this, and the immediately preceding, points, *Cause of Action* has emphasized that a more nuanced agency approach to FOIA compliance is required regarding the size of the public audience to be reached, and the significance of the information imparted. Essentially, that court agreed with bill sponsor statements that "[p]ublic understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter." 799 F.3d at 1116, n. 6. Here, the Center represents members of the group of permittees in New Hampshire, as well as in Massachusetts – a "subset" of the most interested public -- who are adversely affected by the growth conditions mentioned (all are also within the direct jurisdiction of EPA Region 1 as the NPDES permit-issuing entity).

Concerning this point, "The statute requires only that the disclosure be likely to contribute significantly to 'public' understanding." *Cause of Action*, 799. F.3d at 1115-1116. *See also*, 5 U.S.C. § 552(a)(4)(A)(iii). CRR cannot be required to show that it reach a "broad segment" of the public, or a "wide audience," or "a broad cross-section of the public." Its efforts will certainly reach the "sub-set" of entities impacted by the EPA's permitting actions; such impact is all that can be legitimately required.

B. <u>*Second Waiver Requirement*</u>: "[] and is not primarily in the commercial interest of the requester."

- *Existence and Magnitude of Commercial Interest* (Sec. 2.107(l)(3)(i)): The Center stands to receive *no direct financial benefit* from the information received. Instead, the Center seeks the missing information to advise its members, the public, and other permittees, of the basis for EPA decision-making. Moreover, all such entities – *the affected public* – have a critical economic stake in what EPA demands in its permit actions. Flow-related restrictions operate effectively like a sewer connection ban, growth moratorium, or land use controls, to a local government. Even if the Center had received the primary benefit, however, EPA could not find a "commercial" interest bar to providing the requested information: "But since the 1986 amendments, it no longer matters whether the information will also (or even primarily) benefit the requester. Nor does it matter whether the requester made the request for the purpose of

benefitting itself. The statutory criterion focuses *only on the likely effect of* the information disclosure." (First emphasis in original; second emphasis supplied.) *Id*., 799 F.3d at 1118.

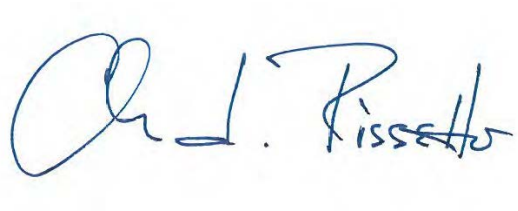
- *Primary Interest in Disclosure* (Sec. 2.107(l)(3)(ii)): EPA regulation states that "A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure." *Id*. While CRR fully meets the EPA announced test; the Agency's standard itself must be construed consistently with *Cause of Action.* Recall that the Court there recognized that it did not matter whether the primary benefit of the information goes to the requester (or even if that was intended), rather, "[t]he statutory criterion focuses only on the *effect* of the information disclosure." 799 F.3d at 1117 (Emphasis in original). Here, the effect of the information requested directly benefits any Region I NPDES permittee, such as Sunapee, that is adversely affected, as well as those that must yet deal with EPA and who anticipate, or have been advised, that they will receive similar flow control results from the Agency.

CONCLUSION

In closing, CRR respectfully requests that the Agency: (1) timely provide the documents requested; and (2) grant the Center's request for a fee waiver in this matter. Please contact the undersigned if you have any questions, beyond any make-weight argument for additional time or clarification.

Thank you.

Respectfully,



Christopher L. Rissetto, General Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NEW ENGLAND - REGION I
FIVE POST OFFICE SQUARE, SUITE 100
BOSTON, MASSACHUSETTS 02109-3912

FACT SHEET

DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT TO DISCHARGE TO WATERS OF THE UNITED STATES

NPDES PERMIT NO.: **NH0100544**

PUBLIC NOTICE START AND END DATES: September 29, 2016 - October 28, 2016

NAME AND MAILING ADDRESS OF APPLICANT:

Town of Sunapee, New Hampshire
23 Edgemont Road
Sunapee, NH 03782

NAME AND ADDRESS OF FACILITY WHERE DISCHARGE OCCURS:

Sunapee Wastewater Treatment Facility
Treatment Plant Road (Route 11)
Sunapee, NH 03782-0347

The Town listed below is a co-permittee for activities required in Part I.B. (Unauthorized Discharges), Part I.C. (Operation and Maintenance of the Sewer System) and Part I.D. (Alternate Power Source).

New London Sewer Commission
c/o Town of New London
P.O. Box 240
New London, NH 03257

RECEIVING WATER: **Sugar River (Hydrologic Basin Code: 01080106)**

CLASSIFICATION: **B**

Sections 305(b) and 303(d) of the CWA require that States complete a water quality inventory and develop a list of impaired waters. Specifically, Section 303(d) of the CWA requires States to identify those waterbodies that are not expected to meet surface water quality standards after the implementation of technology-based controls, and as such, require the development of a Total Maximum Daily Load (TMDL) for each pollutant that is prohibiting a designated use(s) from being attained. The results of the 305(b) assessments are used in the development of the State of New Hampshire's 303(d) lists, which are published every two years and identifies the waterbodies that are not meeting (or are not expected to meet) water quality standards, identifies the designated use(s) that is impaired and also the pollutant(s) causing the impairments.

The segment of the Sugar River that receives the Sunapee WWTF discharge (NHRIV801060405-10) begins just upstream of the Sunapee WWTF discharge and ends at the confluence with an unnamed stream at Route 103. The segment remains on the New Hampshire 2012 303(d) list of impaired waters[1] and has been identified as violating water quality standards for Aquatic Life (dissolved oxygen and pH). The 303(d) list attributes dissolved oxygen issues in this segment of the Sugar River to industrial and municipal point sources discharges.

TMDLs have not been prepared for dissolved oxygen and pH, however, the permit limits in the draft permit are established at criteria. According to the 303(d) list development of a TMDL for dissolved oxygen is a high priority and for pH is a low priority.

Based on the most current information available, EPA believes that the limitations and conditions contained in the draft permit represent the minimum level of control necessary to ensure protection of all designated uses in the receiving waters.

VII. PERMIT BASIS AND EXPLANATION OF EFFLUENT LIMITATION DERIVATION

A. Effluent Flow

Sewage treatment plant discharge is encompassed within the definition of "pollutant" and is subject to regulation under the CWA. The CWA defines "pollutant" to mean, *inter alia*, "municipal . . . waste" and "sewage…discharged into water." 33 U.S.C. § 1362(6).

EPA may use design flow of effluent both to determine the necessity for effluent limitations in the permit that comply with the Act, and to calculate the limits themselves. EPA practice is to use design flow as a reasonable and important worst-case condition in EPA's reasonable potential and water quality-based effluent limitations (WQBEL) calculations to ensure compliance with water quality standards under Section 301(b)(1)(C). Should the effluent discharge flow exceed the flow assumed in these calculations, the instream dilution would decrease and the calculated effluent limits may not be protective of WQS. Further, pollutants that do not have the reasonable potential to exceed WQS at the lower discharge flow may have reasonable potential at a higher flow due to the decreased dilution. In order to ensure that the assumptions underlying the Region's reasonable potential analyses and derivation of permit

[1] http://des.nh.gov/organization/divisions/water/wmb/swqa/2012/documents/a08-303d-list.pdf

effluent limitations remain sound for the duration of the permit, the Region may ensure its "worst-case" effluent wastewater flow assumption through imposition of permit conditions for effluent flow. Thus, the effluent flow limit is a component of WQBELs because the WQBELs are premised on a maximum level of flow. In addition, the flow limit is necessary to ensure that other pollutants remain at levels that do not have a reasonable potential to exceed WQS.

Using a facility's design flow in the derivation of pollutant effluent limitations, including conditions to limit wastewater effluent flow, is consistent with, and anticipated by NPDES permit regulations. Regarding the calculation of effluent limitations for POTWs, 40 C.F.R. § 122.45(b)(1) provides, "permit effluent limitations…shall be calculated based on design flow." POTW permit applications are required to include the design flow of the treatment facility. *Id.* § 122.21(j)(1)(vi).

Similarly, EPA's reasonable potential regulations require EPA to consider "where appropriate, the dilution of the effluent in the receiving water," 40 C.F.R. § 122.44(d)(1)(ii), which is a function of *both* the wastewater effluent flow and receiving water flow. EPA guidance directs that this "reasonable potential" analysis be based on "worst-case" conditions. EPA accordingly is authorized to carry out its reasonable potential calculations by presuming that a plant is operating at its design flow when assessing reasonable potential.

The limitation on sewage effluent flow is within EPA's authority to condition a permit in order to carry out the objectives of the Act. *See* CWA §§ Sections 402(a)(2) and 301(b)(1)(C); 40 C.F.R. §§ 122.4(a) and (d); 122.43 and 122.44(d). A condition on the discharge designed to protect EPA's WQBEL and reasonable potential calculations is encompassed by the references to "condition" and "limitations" in 402 and 301 and implementing regulations, as they are designed to assure compliance with applicable water quality regulations, including antidegradation. Regulating the quantity of pollutants in the discharge through a restriction on the quantity of wastewater effluent is consistent with the overall structure and purposes of the CWA.

In addition, as provided in Part II.B.1 of this permit and 40 C.F.R. § 122.41(e), the permittee is required to properly operate and maintain all facilities and systems of treatment and control. Operating the facilities wastewater treatment systems as designed includes operating within the facility's design effluent flow. Thus, the permit's effluent flow limitation is necessary to ensure proper facility operation, which in turn is a requirement applicable to all NPDES permits. *See* 40 C.F.R. § 122.41.

EPA has also included the effluent flow limit in the permit to minimize or prevent infiltration and inflow (I/I) that may result in unauthorized discharges and compromise proper operation and maintenance of the facility. Improper operation and maintenance may result in non-compliance with permit effluent limitations. Infiltration is groundwater that enters the collection system though physical defects such as cracked pipes or deteriorated joints. Inflow is extraneous flow added to the collection system that enters the collection system through point sources such as roof leaders, yard and area drains, sump pumps, manhole covers, tide gates, and cross connections from storm water systems. Significant I/I in a collection system may displace sanitary flow, reducing the capacity available for treatment and the operating efficiency of the treatment works and to properly operate and maintain the treatment works.

Furthermore, the extraneous flow due to significant I/I greatly increases the potential for sanitary sewer overflows (SSOs) in separate systems. Consequently, the effluent flow limit is a permit condition that relates to the permittee's duty to mitigate (*i.e.*, minimize or prevent any discharge in violation of the permit which has a reasonable likelihood of adversely affecting human health or the environment) and to properly operate and maintain the treatment works. *See* 40 C.F.R. §§ 122.41(d) and (e).

The Sunapee WWTF has a design flow of 0.64 mgd. This flow rate was used to calculate available dilution as discussed below. If the effluent flow rate exceeds 80 percent of the 0.64 mgd design flow (0.512 mgd) for a period of three (3) consecutive months then the permittee must notify EPA and the NHDES-WD and implement a program to maintain satisfactory treatment levels.

Between May 2011 and April 2016, the average flow was 0.36 MGD, with a monthly average flow range from 0.21-0.93 MGD. The maximum daily flow range was from 0.28-1.69 MGD.

B. Conventional Pollutants

1. Five-Day Biochemical Oxygen Demand (BOD_5) and Total Suspended Solids (TSS)

The average monthly and average weekly effluent limitations for BOD_5 and TSS in the draft permit of 30 mg/l and 45 mg/l, respectively, are the same as those in the existing permit, which were based on the secondary treatment regulations for POTWs found at 40 CFR § 133.102(a) and(b). The daily maximum limitations for TSS and BOD_5 (50 mg/l) in the draft permit are the same as those in the existing permit, consistent with the anti-backsliding requirements found at 40 CFR § 122.44(1).

The average monthly, average weekly and maximum daily mass limits for BOD_5 correspond to the respective concentration limits in the draft permit and the POTW's daily design flow of 0.64 MGD. Mass limits are required by 40 C.F.R. Section 122.45(f). The calculations for the mass limits are shown below.

BOD_5 and TSS Mass Loading Calculations:

$L = C_d \times Q_d \times 8.34$ where:

L = Maximum allowable load in lbs/day
C_d = Maximum allowable effluent concentration for reporting period in mg/l
Q_d = Design flow of facility in MGD
8.34 = Factor to convert effluent concentration in mg/; and design flow in MGD to lbs/day

BOD_5 and TSS

30 mg/l x 8.34 x 0.64 MGD = 160 lbs/day
45 mg/l x 8.34 x 0.64 MGD = 240 lbs/day
50 mg/l x 8.34 x 0.64 MGD = 267 lbs/day

Between May 2011 and April 2016, there was 1 violation of the BOD_5 effluent limitations (Maximum Daily = 71 mg/l – September 2011). Based on Discharge Monitoring Reports